No. 7968

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United States Circuit Court of Appeals

For the Ninth Circuit

MOCK GUM YING,
Appellant,

vs.

EDWARD W. CAHILL, as Commissioner of Immigration and Naturalization for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

A petition for a writ of habeas corpus, which was sought in behalf of the appellant, who was denied admission to the United States by the immigration authorities, was denied by the District Court for the Northern District of California, Southern Division (Tr. p. 14). From a denial of the petition, this appeal comes.

FACTS OF THE CASE.

The material facts, which are disclosed by the immigration records on file as exhibits, and which are undisputed, are as follows: the appellant was born in China on March 4, 1914, and arrived in the United States on August 4, 1934; her parents had intermarried in the United States prior to March 2, 1907, the exact date not being known, and departed for China in 1906; the father was an alien Chinese; he died in 1916; the mother was born in the United States in 1884; she died in 1927; the appellant has a brother, Mock Sing Yow, and a sister, Mock King Far, both of whom were born in China; the brother and sister, in company with their mother, came to the United States in 1920 and were admitted as citizens of the United States; in 1932, Mock Sing Yow, prior to departure for China, was issued a citizen's return certificate and was admitted by the immigration authorities at San Francisco on his return from China in 1933 under a citizenship status (Findings and Decision of Secretary of Labor, Respondent's Exhibit "A"; Immigration File of Mock Sing Yow; Immigration File of Mock King Far).

QUESTION IN THE CASE.

The sole question in the case is whether or not the foreign born child of an alien father and a native born American citizen mother is entitled to admission to the United States under a citizenship status.

ARGUMENT.

THE APPELLANT DERIVED AMERICAN CITIZENSHIP THROUGH HER MOTHER.

Under the Act of March 2, 1907 (Ch. 2534, Sec. 3, 34 Stat. L. 1228), an American woman, who married a foreigner, took the citizenship of her husband. The Act, however, was not retroactive and applied only to American women, who married foreigners, after March 2, 1907 (*Petition of Zogbaum,* 32 Fed. (2d) 911). Since the appellant's mother married her alien husband prior to March 2, 1907, it will follow that she did not lose her American citizenship. The Secretary of Labor is in accord.

The appellant, claiming to have derived American citizenship through her mother, invokes the second clause of the Act of April 14, 1802, which provides as follows:

> "The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; *and the children of persons, who now are, or have been, citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof;* * * * ." (8 U. S. C. A. Section 7.)

The foregoing provision of law was re-enacted on June 22, 1874, and incorporated in the Revised Statutes as Section 2172; it was incorporated, as indicated, in the "Code of the Laws of the United States in force December 7, 1925, as enacted by Congress on June 28 and approved on June 30, 1926", as Title 8, Section 7. We assume that it will be conceded that this provision of law has not been repealed. No doubt appellee will contend that the second clause, upon which appellant relies, is merely retrospective and not prospective and that, therefore, the clause covers only the children of persons, who were at the time of the passage of the Act, or previously had been, citizens of the United States. The appellant's mother was born in 1884. We submit that the clause in question should be construed prospectively so as to include the child of a parent, who was born in the United States *subsequent* to June 22, 1874, the date of the re-enactment, as Section 2172 of the Revised Statutes, of the Act of April 14, 1802, supra.

In the case of *United States v. Kellar,* 13 Fed. 82, identical statute was construed with direct reference to the question of the citizenship of children of persons who acquired American citizenship subsequent to the passage of the statute. There, the facts disclosed that the child, whose citizenship was at issue, was foreign-born of parents, who were subjects of Prussia; his father died in Prussia, without ever having been in this country; his mother came to the United States and in 1868 intermarried here with a naturalized cit-

izen. The Court, through Associate Justice Harlan of the Supreme Court, sitting in Circuit Court, *held*

First, that the child's mother, upon her marriage to a naturalized citizen, became, *ipso facto,* a citizen of the United States, under Section 1994 of the Revised Statutes, which was reproduced from the Act of February 10, 1855 (10 Stat. at Large 604) and which declared that "any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen", and

Secondly, that the child, upon the acquisition of citizenship by his mother, became a citizen under *Section 2172 of the Revised Statutes* through the citizenship of his mother.

Justice Harlan said:

"It is not denied that the mother of the defendant belonged to the class of persons who, under the laws of congress, might have been lawfully naturalized. Upon her marriage, therefore, with a naturalized citizen of the United States she became, under the plain words of section 1994, *ipso facto,* a citizen of the United States, as fully as if she had complied with all of the provisions of the statutes upon the subject of naturalization. There can be no doubt of this, in view of the decision of the supreme court of the United States in Kelly v. Owen, 7 Wall. 496, where it became necessary to construe the act of February 10, 1855, which, in respect of the matter now before us, is similar to section 1994 of the Revised Statutes. This language was used in that case:

'As we construe of this act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of congress provide. The terms "married" or "who shall be married," do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that whenever a woman who, under previous acts, might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship upon her.'

The object of the act, said the court, was to allow the citizenship of the wife 'to follow that of the husband, without the necessity of any application for naturalization on her part.'

The mother of the defendant having thus become a citizen by force alone of her marriage with a naturalized citizen in the year 1868, did not the defendant, being *then* a minor and dwelling in the United States, himself also become, *ipso facto,* a citizen? It seems to the court that this question must be answered in the affirmative. The case seems to be so distinctly one of those embraced by the very language of section 2172, that argument could not make it plainer.

It was suggested that the act of 1802, from which, as we have seen, *section 2172 is taken, was intended to be temporary in its operation, and to*

*apply only to cases arising previous to its passage. In support of that proposition reference was made by counsel to Campbell v. Gordon, 6 Cranch, 176. But the court does not perceive that that case maintains, or that the language of the act of 1802, in any degree justifies, any such interpretation of the statute. * * *.*"

In the case of *Boyd v. State of Nebraska,* 143 U. S. 135, 12 Sup. Ct. Rep. 375, 36 L. Ed. 103, the Supreme Court, at page 115 (L. Ed.), said:

"The rule was to be a uniform rule, and we perceive no reason for limiting such a rule to the children of those who had been already naturalized. In our judgment the intention was that the Act of 1802 should have a prospective operation. United States v. Kellar, 13 Fed. Rep. 82; West v. West, 8 Paige, 433, 4 L. Ed. 492; State v. Andriano, 92 Mo. 70, 10 West. Rep. 35; State v. Penny, 10 Ark. 621; O'Connor v. State, 9 Fla. 215."

In the case of *Zartarian v. Billings,* 204 U. S. 170, 27 Sup. Ct. Rep. 182, 51 L. Ed. 428, the Supreme Court said:

"The relevant section, 2172, which it is maintained confers the right of citizenship, is the culmination of a number of acts on the subject passed by Congress from the earliest period of the government. Their history will be found in vol. 3, Moore's International Law Digest, p. 467.

The Act of 1872 is practically the same as the act of April 14, 1802 (2 Stat. at L. 153, chap. 28, U. S. Comp. Stat. 1901, p. 1334), which provided:

'The children of persons duly naturalized under any of the laws of the United States * * * being under the age of twenty-one years at the time of their parents being so naturalized * * * shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who are now or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States.'

In Campbell v. Gordon, 6 Cranch. 176, 3 L. ed. 190, it was held that this act conferred citizenship upon the daughter of an alien naturalized under the act of January 29, 1795 (1 Stat. at L. 414, chap. 20), she being in this country at the time of the passage of the act of April 14, 1802, and then 'dwelling in the United States.'

The act has also been held to be prospective in its operation and to include children of aliens naturalized after its passage, when 'dwelling in the United States.' Boyd v. Nebraska, 143 U. S. 135, 177, 36 L. ed. 103, 115, 12 Sup. Ct. Rep. 375."

Upon authority, therefore, of the cases of *United States v. Kellar,* supra, *Boyd v. State of Nebraska,* supra, and *Zartarian v. Billings,* supra, in each of which the effect of the Act of April 14, 1802, as carried into the Revised Statutes as Section 2172, was directly considered, it must be conceded that the Act was *prospective* in operation and not merely retrospective. True, in each of the cases cited, the Court dealt with the child of a parent, who became a

naturalized citizen after the passage of the Act in question. In the case at bar, we are dealing with a child of a parent, who was a native born citizen and who was born after the passage of the Act in question. However, the Act, itself, does not make any distinction between the child of a naturalized parent and the child of a native born parent, except that in the case of the former the child becomes a citizen only when "dwelling in the United States." (*Zartarian v. Billings,* supra.) In respect to a parent, who is a citizen by fact of native birth and not through naturalization, no condition as to residence of the child, in order for the latter to acquire citizenship through the citizenship of the parent, is attached.

The Secretary of Labor holds that the child of a native born parent is in the same position as the child of a naturalized parent; that, inasmuch as the child of a naturalized parent must dwell in the United States, in order to acquire citizenship, the child of a native born parent must, also, dwell in the United States. He relies upon the provisions of Section 5 of the Act approved March 2, 1907, (8 U. S. C. A. Sec. 8) as amended by the Act approved May 24, 1934, which amended section reads as follows:

> "That a child born without the United States of *alien* parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or mother; Provided, that such naturalization or resumption shall take place during the minority of such minor child; And provided fur-

ther, that the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

Clearly, the statute, upon which the Secretary of Labor relies, relates solely to a parent, who has become naturalized, either because he was born an alien or was born an American citizen and had lost his citizenship. Since the appellant's mother was born a citizen and never lost her citizenship, the statute is manifestly inapplicable.

No reason may be assigned for according to a foreign born child of a *naturalized* person a citizenship status, irrespective of when the parent was naturalized, whether *before* or *after* the enactment of Section 2172 of the Revised Statutes, supra, and, at the same time, restricting the citizenship status of a foreign born child of a *native born American citizen* to a child whose parent was born in the United States *before* the enactment of the section. The statute, itself, does not place the child of a native born citizen in a position less favorable than a child of a naturalized citizen. Indeed, the Attorney General has ruled that the foreign born child of a native born American parent is in precisely the same position as the foreign born child of a parent, who has resumed citizenship, through naturalization, under the provisions of Section 5 of the Act of March 2, 1907, as amended May 24, 1934 (8 U. S. C. A. Section 8), thus, clearly showing that the former is in a position, at least, as favor-

able as the latter. We quote from the decision of the Secretary of Labor, in which the opinion of the Attorney General appears, as follows:

> "It is believed that the instant case should be considered under the provisions of Section 5 of the Act approved March 2, 1907, as amended by the Act approved May 24, 1934, which amended section reads as follows:
>
> 'That a child born without the United States of *alien* parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or mother; Provided, that such naturalization or resumption shall take place during the minority of such minor child: and provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States.'
>
> While this section apparently deals with the case of a child born abroad to *alien* parents and provides that such a child shall be deemed a citizen by virtue of the naturalization of or resumption of the American citizenship of the father or the mother during the minority of the child, the Attorney General in an opinion rendered March 1, 1933, in the case of the minor child of Mrs. DeColl, placed the foreign-born child of a native-born American woman who had not lost her citizenship but who had taken up permanent residence in the United States in the same position as the foreign-born child of a mother who had resumed her citizenship through naturalization. The opinion in question contains the following:

> 'It appears that the child with which we are concerned was born an alien and therefore the question is whether he has become a naturalized American citizen by virtue of the provisions of section 5 of the Act of March 2, 1907, above quoted. The answer to this question depends on what is meant by the word "parent" in that statute. While under section 5 of that statute Congress is dealing with cases of resumption of American citizenship, there seems to be no good reason for supposing that the Congress intended to decline to grant citizenship to the minor child merely because its mother never lost her American citizenship, having married after the effective date of the Act of 1922. I think, therefore, that so far as the citizenship of her child is concerned Mrs. DeColl should be treated as in precisely the same situation as one who had resumed her citizenship.' "
>
> (Immigration Record, Exhibit "A".)

The Attorney General did not, however, hold, as did the Secretary of Labor, that the provisions of Section 5 of the Act of March 2, 1907, supra, determine the citizenship status of the foreign born child of a native born American parent, but merely that Congress, by enacting the provisions of the section of the statute mentioned, could not have intended to restrict the rights of a native born American parent, insofar as the citizenship of her foreign born child was concerned, or to decline to accord citizenship to such child, merely because the mother never lost her American citizenship.

Statutes should be construed prospectively unless the language is express to the contrary or there is necessary implication to that effect (*Fullerton-Krueger Lumber Co. v. Northern Pac. Ry. Co.,* 266 U. S. 435, 45 Sup. Ct. Rep. 143, 69 L. Ed. 367 and cases cited therein).

Section 1993 of the Revised Statutes (8 U. S. C. A. Section 6) accords to a foreign born child, whose father is a citizen, the rights of citizenship. This statute requires a foreign born American citizen father to reside in the United States *prior* to the birth of the child, in order for the child to acquire citizenship (*Weedin v. Chin Bow,* 274 U. S. 657). It merely furnishes another method of acquiring citizenship by a foreign born child and does not in any manner restrict the rights of citizenship accorded to the foreign born child of an American born father or mother, who necessarily resided in the United States prior to the birth of the child.

A person may be, or become, a citizen of the United States through different methods or situations. He may be born in this country (Revised Statutes, Section 1992; *U. S. v. Wong Kim Ark,* 169 U. S. 649); he may be the foreign born child of an American citizen father, who resided in the United States prior to the birth of the child (Revised Statutes, Section 1993, *Weedin v. Chin Bow,* supra), he may be the foreign born child of a naturalized citizen of the United States (Section 5 of Act of March 2, 1907, 34 Stat. at L. 1229); he may be the foreign born

child of an American born father or mother (Revised Statutes, Section 2172, 8 U. S. C. A. Section 7). These laws were enacted to cover various circumstances and situations. If a person meet the requirements of any one of these laws, he is a citizen of the United States.

As a final consideration, we respectfully call attention to the fact that the immigration authorities in 1920 admitted to the United States, as citizens thereof, the appellant's brother, Mock Sing Yow, and the appellant's sister, Mock King Far, both of whom were born in China. Moreover, in 1932, the status of the brother, Mock Sing Yow, as an American citizen, was confirmed by the immigration authorities when these authorities issued him a citizen's return certificate, upon which he departed for China and upon which he was admitted when he returned to the United States in 1933.

The prior executive decisions in favor of the American citizenship of the appellant's brother and sister are entitled to serious consideration as evidence of the policy of the executive authorities over a period of years to classify the foreign born child of an American born mother as a citizen of the United States. It is a fundamental rule that the construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons and that, in case of doubt, the Court will look with disfavor upon any change in the policy and practise of the executive department (*Robertson v. Downing,* 127 U. S. 607; *Hewitt v. Schultz,* 180 U. S. 139).

CONCLUSION.

It is earnestly submitted that the appellant derived American citizenship through her mother.

It is respectfully asked that the order of the Court below denying the petition for a writ of habeas corpus be reversed.

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